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# Garner v. United States: Self-Incrimination and the Use of Tax Returns in Nontax Criminal Prosecutions--The Ninth Circuit Attempts a Balancing Act

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# GARNER v. UNITED STATES: SELF-INCRIMINATION AND THE USE OF TAX RETURNS IN NONTAX CRIMINAL PROSECUTIONS—THE NINTH CIRCUIT ATTEMPTS A BALANCING ACT

Currently, 75 million individuals file federal tax returns annually.[1] Few of these taxpayers consider the possibility that the information they report could be used against them in criminal prosecutions, not only for violation of the tax laws, but for all prosecutions by both federal and state authorities. The legality of such usage, despite the self-incrimination clause of the Fifth Amendment, has been consistently upheld by the federal courts.[2] It is therefore with obvious, if unknowing, relief that taxpayers may greet a recent decision of the Ninth Circuit Court of Appeals. On June 5, 1972, that court decided *Garner v. United States*,[3] a precedent shattering decision which, if allowed to stand, will significantly curtail the use of tax returns in non-tax-related criminal prosecutions.

Roy D. Garner was tried in the United States District Court for the Central District of California on a two count indictment. He was convicted on count one, which charged a conspiracy to violate federal statutes prohibiting the transmission of wagering information,[4] the interstate travel or transportation in aid of racketeering enterprises,[5] and perjury in sporting events.[6] A motion for judgment of acquittal was granted on the second count, which charged Garner with aiding and

1. This figure represents the average number of returns filed in the 1970 and 1971 calendar years for the 1969 and 1970 tax years. INTERNAL REVENUE SERVICE, STATISTICS OF INCOME—1970 INDIVIDUAL INCOME—TAX RETURNS 2 (1972 Preliminary Report).

2. See text accompanying notes 23-98 *infra*.

3. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972), *petition for rehearing denied*, Sept. 11, 1972, *petition for rehearing granted*, Dec. 13, 1972, *submission for writ of prohibition staying Appellate Court proceedings granted, sub nom.* Garner v. Chambers, 41 U.S.L.W. (U.S. March 20, 1973) (No. 72-1171). This case remains unreported to the date of this writing.

4. 18 U.S.C. § 1084 (1970).

5. *Id.* § 1952.

6. *Id.* § 224.

abetting another in a substantive violation.[7] At trial the government introduced into evidence Garner's individual income tax returns for the years 1965, 1966 and 1967. Virtually all his income in those years was reported as derived from gambling, and this apparently convinced the jury that Garner had been engaged in the business of betting and wagering—an essential element in transmission of wagering information.[8] On appeal, the Ninth Circuit held that in prosecutions unrelated to the income tax laws, the Fifth Amendment privilege against self-incrimination allows a defendant to object to the subsequent prosecutorial use of his income tax returns absent the showing of a knowing and intelligent waiver of the privilege when the return was filed.

The Fifth Amendment provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ."[9] The privilege has been labeled as reflective of many fundamental values and most noble aspirations.[10] These include the unwillingness to subject those suspected of crime to choose between self-incrimination, perjury or contempt, dislike for an inquisitiorial system of criminal justice, fear that an individual will be coerced into self-incriminatory statements, requiring the government to shoulder the entire burden of prosecution, distrust of self-deprecatory statements, and respect for the inviolability of the human personality.[11] On the other hand, such reasons are often said to be mere judicial gloss, and the real policies behind the privilege identified as the need to preserve morality in government and protection of the right to privacy.[12]

Historically, the privilege was available only to the accused party[13] or witnesses[14] in criminal proceedings, but its scope is expanding to include testimony given to administrative agencies[15] and congressional committees,[16] as well as testimony in civil proceedings.[17] In 1964, the

7. Brief for Appellee at 2, Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972).

8. 18 U.S.C. § 1084 (1970).

9. U.S. CONST. amend. V. For an historical analysis of the privilege against self-incrimination see L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

10. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

11. Couch v. United States, 93 S. Ct. 611, 615-16 (1973), *quoting from* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

12. McKay, *Self-Incrimination and the New Privacy*, 1967 SUPREME CT. REV. 193, 214.

13. MCCORMICK ON EVIDENCE § 116, at 248 (2nd ed. 1972).

14. Grosso v. United States, 390 U.S. 62, 76 (1968) (Stewart, J., concurring).

15. ICC v. Brimson, 154 U.S. 447 (1894). *See generally* Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 HARV. L. REV. 694 (1926).

16. Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955); Bart v. United States, 349 U.S. 219 (1955). *See generally The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 131 (1955); Note, 49 COLUM.

Supreme Court employed the due process clause to hold the privilege applicable to state prosecutions.[18]

Against this background and expansion, there were three judicially promulgated rules concerning the privilege against self-incrimination and its relation to government required information prior to *Garner*.[19] One rule stemmed from the *Marchetti* line of cases and precluded the enforcement of a self-disclosure statute which is directed at an inherently suspect group in a field of inquiry permeated with criminal statutes.[20] The second rule was the "required records" doctrine or the *Shapiro* rule. Under that rule, the government could use information which had "public aspects," was customarily kept, and was in an essentially regulatory field of inquiry.[21] Finally, the *Sullivan* rule required disclosure of information by individuals involved in a legitimate field of governmental inquiry.[22] This note will discuss the nature and vitality of these three rules and their application to *Garner*, the possibility that *Garner* establishes a new rule, and the nature, foundation and implications of such a new rule.

## Pre-Garner Doctrines Concerning the Privilege Against Self-Incrimination and Government Required Information

### The Marchetti Rule

The Supreme Court, in reversing the convictions in *Marchetti v. United States*,[23] *Grosso v. United States*[24] and *Haynes v. United*

L. REV. 87, 90-94 (1949).

17. California v. Byers, 402 U.S. 424, 437 (1971) (Harlan, J., concurring). *See, e.g.*, McCarthy v. Arndstein, 262 U.S. 355 (1923) (bankruptcy), *aff'd on rehearing*, 266 U.S. 34 (1924).

18. Malloy v. Hogan, 378 U.S. 1 (1964).

19. Powell & Jones, *Self-Incrimination and Fair Play-Marchetti, Grosso, and Haynes Examined*, 18 AM. U.L. REV. 114, 119 (1968); Note, 21 BUFFALO L. REV. 509, 512-16 (1972).

20. See text accompanying notes 23-61 *infra*.

21. See text accompanying notes 62-90 *infra*.

22. See text accompanying notes 91-103 *infra*.

23. 390 U.S. 39 (1968). The Court of Appeals for the Second Circuit had affirmed convictions under two indictments. The first averred that defendant and others conspired to evade the annual occupational tax on gamblers, and the second alleged a willful failure both to pay the occupational tax and to register before engaging in the business of accepting wagers.

24. 390 U.S. 62 (1968). The Court of Appeals for the Third Circuit had affirmed convictions for willful failure to pay the excise tax on wagering, for the occupational tax imposed, and for conspiracy to defraud the government by evading payment of both taxes.

*States*,[25] held that the privilege against self-incrimination is a complete defense to any criminal charges arising incident to noncompliance with registration statutes.[26] This rule was held to apply, however, only when compliance with the statute would be a significant link in the chain of evidence tending to establish guilt.[27] Although the facts in *Garner* did not warrant application of the *Marchetti* rule, an understanding of the rule is essential because the *Garner* court relied heavily on its reasoning in barring the use, in a subsequent nontax criminal proceeding, of the defendant's income tax returns.

To invoke the *Marchetti* rule three essential components must be present. First, the registration or disclosure must operate in a field of conduct permeated with statutes prescribing criminal sanctions. Second, the statute must be directed at individuals who are considered inherently suspect of criminal activities. Finally, the danger of incrimination presented by the statute must be "real and appreciable."[28] Upon establishing these prerequisites, an individual can entirely resist registration by asserting his privilege against self-incrimination. Threshold discussion of the rule is necessary because *Marchetti* significantly modified the two previous doctrines pertaining to the privilege when related to government-required information. The Courts of Appeals in *Marchetti* and *Grosso* affirmed convictions by relying on *United States v. Kahriger*[29] and *Lewis v. United States*,[30] and as the Supreme Court reversed those convictions, it overruled pro tanto both of the latter cases.

In *Kahriger*, the Court found constitutional federal statutes imposing an occupational tax on gamblers and requiring registration with the Internal Revenue Service before engaging in the business of accepting wagers.[31] The Supreme Court held that the wagering tax statutes presented no compulsion to the potential registrant. There was, argued *Kahriger*, no compulsion to confess to the present or past acts to which

25. 390 U.S. 85 (1968). The Court of Appeals for the Fifth Circuit affirmed a conviction for a National Firearms Act violation; *i.e.*, that defendant knowingly possessed a firearm which had not been registered with the Secretary of the Treasury. 26 U.S.C. § 5841 (1970).

26. A registration statute commands an individual to register or submit information to an appropriate governmental agency under penalty for noncompliance. *E.g.*, INT. REV. CODE OF 1954, § 4412 (registration as a gambler); INT. REV. CODE OF 1954, § 5841 (registration of firearms).

27. *See* 390 U.S. 39, 48 (1968).

28. California v. Byers, 402 U.S. 424, 429-30 (1971).

29. 345 U.S. 22, *rehearing denied*, 345 U.S. 931 (1953).

30. 348 U.S. 419, *rehearing denied*, 349 U.S. 917 (1955).

31. The information charging Kahriger with violation of these federal statutes had been dismissed by the district court. The court held the statutes unconstitutional as a usurpation of the state's police power. United States v. Kahriger, 105 F. Supp. 322 (E.D. Pa. 1952).

the privilege specifically applied. Instead, the wagering tax statutes were prospective in their application—merely prescribing the conditions precedent to engaging in a particular activity.[32]

In *Lewis*,[33] the Court relied on *Kahriger* to support the proposition that the wagering tax statute was applicable only to future acts.[34] As to the statutory compulsion, the Court found that a waiver of the privilege against self-incrimination was necessarily implied from the defendant's conduct. The only compulsion under the statute related to the initial choice made at the commencement of the wagering activities. As such, held *Lewis*, the act did not compel self-incrimination:[35] "They may have to give up gambling, but there is no constitutional right to gamble."[36] Following the reasoning of *Lewis*, when individuals engage in an activity subject to registration statutes which provide for self-disclosure concerning that activity, they do so at the cost of their Fifth Amendment rights. Since the initial decision to gamble was voluntary, the disclosures required by the statute are similarly voluntary, and consequently not within the purview of the constitutional privilege.[37]

In *Marchetti*, the Court held the reasoning employed in *Kahriger* and *Lewis* no longer persuasive,[38] in that those cases declared the privilege against self-incrimination to be solely retrospective in application. The basic deficiency found was that the chronological formula was too inflexible, and that if perpetuated it would abrogate the basic policies behind the constitutional privilege. Withdrawal of this privilege in regard to future conduct, said *Marchetti*, would unduly limit its protection. The Court concluded that "it is not mere time to which the law must look, but to the substantiality of the risks of incrimination."[39] The Court also held the reasoning of *Kahriger* and *Lewis* to be lacking in a second, more practical respect—that is, payment of the occupational tax and the registration requirement was applicable only to future acts, thus overlooking the hazards of incrimination as to past or present acts.[40] Compliance with the statutory provisions would

32. 345 U.S. at 32-33.

33. Lewis had been charged with professionally accepting wagers without paying the requisite occupational tax. The trial court had granted a motion to dismiss. United States v. Lewis, 100 A.2d 40, 41 (D.C. Mun. Ct. App. 1953).

34. 348 U.S. at 422.

35. Lewis v. United States, 348 U.S. 419, 422-23 (1955).

36. *Id.*

37. Marchetti v. United States, 390 U.S. 39, 51 (1968).

38. If the privilege against self-incrimination is denied to one who has "voluntarily" engaged in criminal behavior then the protection of the privilege is withdrawn from those who it was designed to protect. *Id.*

39. *Id.* at 54.

40. *Id.* at 52.

plainly increase the likelihood of discovery and successful prosecution for past or present offenses,[41] because it would center attention upon the gambler and aid in the collection of admissible evidence.[42] Compliance would also disclose anticipated conduct which directly conflicts with the protection of the individual's right to privacy, a basic policy goal behind the privilege.[43]

The *Marchetti* line of cases holds the privilege against self-incrimination to be a complete defense to compulsory schemes of self-disclosure, at least in cases where that scheme operates in an area permeated with criminal statutes and concerns a group inherently suspect of criminal activities.[44] In this way, *Marchetti* applies the approach announced by the Supreme Court in *Albertson v. Subversive Activities Control Board.*[45] In *Albertson,* the petitioners resisted an order directing them—as members of a Communist-action organization—to file a registration statement[46] with the appropriate governmental agency. The Court held the order unenforceable since the registration was unconstitutional as a violation of the privilege against self-incrimination.[47]

Another barrier to invocation of the privilege requires that the danger of incrimination must be "real and appreciable."[48] Should the hazards prove to be nothing more than "imaginary and unsubstantial," the privilege will not apply.[49] Nevertheless, the *Marchetti* filing of the wagering excise tax return, and the obligation to pay the excise tax, met the "appreciable danger" requirement.[50]

41. The Court through Mr. Justice Harlan makes it clear that these offenses are not limited to those involving actual gambling, but may extend to custody or transportation of gambling equipment, or other preparations for gambling activity. *Id.*

42. *Id.*

43. See text accompanying notes 9-12 *supra.*

44. *See, e.g.,* Mackey v. United States, 401 U.S. 667 (1971) (*Marchetti* not applied retroactively for postconviction relief); Leary v. United States, 395 U.S. 6 (1969) (*Marchetti* reasoning applied to the Marijuana Tax Act).

45. 382 U.S. 70 (1965).

46. Act of Sept. 23, 1950, ch. 1024, § 8, 64 Stat. 995.

47. Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 77-79 (1965).

48. *E.g.,* Marchetti v. United States, 390 U.S. 39, 48 (1968); Grosso v. United States, 390 U.S. 62, 66-67 (1968); Haynes v. United States, 390 U.S. 85, 97 (1968).

49. *See, e.g.,* Brown v. Walker, 161 U.S. 591 (1896) (possibility of incrimination under state law was imaginary and unsubstantial in light of federal immunity statute); Rogers v. United States, 340 U.S. 367 (1951) (after petitioner's admission that she held office of Treasurer of the Communist Party of Denver the disclosure of acquaintance with her successor presented no more than a mere possibility of increasing the danger of prosecution). This requirement originated in the old English decision of Queen v. Boyes, 121 Eng. Rep. 730 (K.B. 1861).

50. 390 U.S. at 54; *accord,* Grosso v. United States, 390 U.S. 62, 65-66 (1968). Similarly, in Haynes v. United States, 390 U.S. 85 (1968), compliance with the registration provisions of the National Firearms Act was held to create more than a remote possibility of criminal prosecution. *Id.* at 97.

In an analogous situation, the Court in *California v. Byers*[51] was faced with the question of whether the privilege against self-incrimination was impinged upon by California's "hit and run" statute.[52] The statute in question requires the driver of a motor vehicle to stop at the scene of the accident and give his name and address. The Court found no constitutional violation because only *possibility* of incrimination existed;[53] as such the "hit and run" statute did not entail the substantial risks of self-incrimination involved in *Marchetti*.[54] The judgment involves the matter of degree to which the individual's claim to constitutional protection will be balanced against the public need for information.[55]

Applying the *Marchetti* rule to the factual situation in *Garner*, it is clear that Garner would not have been wholly excused from filing his income tax returns[56]—none of the three essential components are present.[57] The statute requiring self-disclosure of information is not directed at a group inherently suspect of criminal activities. It is, rather, directed at the public at large.[58] Second, the field of inquiry is not permeated with criminal statutes, although the Internal Revenue Code does define some criminal offenses.[59] Finally, compliance with the return requirements would create only the mere possibility of incrimination, thereby failing to meet the "appreciable danger" requirement.[60] Although not applicable to the fact situation, *Garner* relied heavily on *Marchetti*. As discussed below, *Garner* adopts the *Marchetti* reasoning to invalidate the finding of an implied waiver of the privilege against self-incrimination.[61]

**The "Required Records" Doctrine**

Perhaps coexisting with the *Marchetti* rule is the "required records" doctrine which, when operative, eliminates the privilege against

51. 402 U.S. 424 (1971).

52. CAL. VEH. CODE § 20002(a)(1) (West 1971).

53. *Id.* at 428. "[U]nlikely possibilities present only 'imaginary and insubstantial' hazards of incrimination, rather than 'real and appreciable' risks needed to support a Fifth Amendment claim." Minor v. United States, 396 U.S. 87, 97-98 (1969).

54. 402 U.S. at 431.

55. *Id.* at 427. Concurring in the opinion, Mr. Justice Harlan believed that where a self-reporting scheme was essential to the government's regulatory purpose, the alternative of leaving it unenforceable whenever a Fifth Amendment claim was made was unacceptable. *Id.* at 440-43, 452 (Harlan, J., concurring).

56. Note, 63 NW. U.L. REV. 398, 401 (1968).

57. See text accompanying notes 23-37 *supra.*

58. California v. Byers, 402 U.S. 424, 430 (1971).

59. INT. REV. CODE OF 1954, §§ 7201-7216.

60. *See* California v. Byers, 402 U.S. 424, 427-28 (1971).

61. See text accompanying notes 124-145 *infra.*

self-incrimination with respect to statutorily required records. The privilege may only be asserted by a natural person with respect to his private documents.[62] Thus, the privilege may not be claimed for corporate records,[63] partnership records,[64] or unincorporated associations such as labor unions.[65] The continued vitality of this doctrine at the present time is in doubt, and in any case, its applicability to income tax returns is questionable.

The genesis of the required records doctrine was the 1886 case of *Boyd v. United States*,[66] where the Court held unconstitutional on Fourth and Fifth Amendment grounds a statute[67] authorizing the production of private papers. The Court stated in dictum, however, that those records statutorily required could not be brought within the same constitutional protections.[68] This dictum was given decisional foundation in *Wilson v. United States*,[69] where the Court held that an officer of a corporation, with custody of corporate records, could not refuse to produce them pursuant to a court order.

The leading case applying the required records doctrine was *Shapiro v. United States*.[70] The appellant was a wholesale produce dealer, and regulations under the Emergency Price Control Act of 1942[71] required him to keep and make available for examination such records as he customarily maintained in his business. Appellant produced these records in compliance wtih a subpoena duces tecum and was later convicted of having made tie-in sales in violation of the act. The

62. 8 J. WIGMORE, EVIDENCE § 2259 (McNaughton rev. 1961); *see* Couch v. United States, 93 S. Ct. 611, 616 (1973).

63. Wilson v. United States, 221 U.S. 361, 380-85 (1911); Grant v. United States, 227 U.S. 74 (1913). *But cf.* Application of Daniels, 140 F. Supp. 322 (S.D. N.Y. 1956) (alien corporation not subject to jurisdiction of United States and thus sole stockholder held the corporate records in a purely personal capacity). For a criticism of this rule in relation to corporate records see Wild v. Brewer, 329 F.2d 924, 925-29 (9th Cir.) (Madden, J., dissenting), *cert. denied*, 379 U.S. 914 (1964). *See generally* Annot., 154 A.L.R. 279 (1945); Note, 78 HARV. L. REV. 455 (1964).

64. United States v. Wernes, 157 F.2d 797 (7th Cir. 1946) (limited partnership). *Contra*, United States v. Lawn, 115 F. Supp. 674, 677 (S.D.N.Y. 1953), *aff'd* 355 U.S. 339, *rehearing denied*, 355 U.S. 967 (1958). *See generally* 63 COLUM. L. REV. 1319 (1963).

65. United States v. White, 322 U.S. 694, 704 (1944).

66. 116 U.S. 616 (1886).

67. Act of June 22, 1874, ch. 391, § 5, 18 Stat. 187.

68. "[T]he supervision authorized . . . over . . . books required by law to be kept for . . . inspection, are necessarily excepted out of the category of unreasonable searches and seizures." Boyd v. United States, 116 U.S. 616, 623-24 (1886). Shapiro v. United States, 335 U.S. 1 (1948) recognized this as a principle of law. *Id.* at 33-34 & n. 42.

69. 221 U.S. 361 (1911).

70. 335 U.S. 1, *rehearing denied*, 335 U.S. 836 (1948).

71. Law of Jan. 30, 1942, ch. 26, § 202(b), 56 Stat. 23.

Supreme Court affirmed in a five to four decision, holding that the privilege against self-incrimination cannot be claimed by defendants compelled to produce those business records required by statute.

*Marchetti* and *Grosso* distinguished *Shapiro*, holding the required records doctrine inapplicable to the cases at hand.[72] Justice Brennan, in his concurring opinion, stated that "nothing we decide or say today in any wise impairs or modifies . . . *Shapiro v. United States* . . . ."[73] A number of authorities, however, believe *Shapiro* relied on an implied waiver of the privilege against self-incrimination.[74] Since *Marchetti* directly questions the propriety of inferring an implied waiver of a constitutional right from the circumstances, it raises considerable doubt concerning *Shapiro*'s continued vitality.[75]

Assuming arguendo that *Shapiro* is still good law, its application to income tax returns and records is questionable. Three requirements define the bounds of the required records doctrine: the United States' inquiry must be essentially regulatory, the records required to be kept must be those customarily preserved, and the records themselves must have assumed "public aspects."[76] It is by no means clear that income tax returns satisfy the aforementioned requirements to the extent necessary to bring the information they contain within the purview of the doctrine.

The internal revenue laws, which are directed at the public at large, have as their principal purpose the collection of tax monies.[77] Although the Internal Revenue Code does define some criminal offenses,[78] the primary thrust of the code is not prosecutorial but regulatory.[79] If considered essentially regulatory, the first requirement for the application of the required records doctrine is satisfied.[80]

72. Marchetti v. United States, 390 U.S. 39, 56-57 (1968); Grosso v. United States, 390 U.S. 62, 67-69 (1968).

73. Grosso v. United States, 390 U.S. 62, 72 (1968) (Brennan, J., concurring).

74. Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 712 (1951); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 273 (1971); Note, 68 HARV. L. REV. 340, 343 (1954); Note, 63 NW. U.L. REV. 398, 404 (1968); *see* Note, 3 ARK. L. REV. 214 (1949).

75. 390 U.S. at 51-52. See text accompanying notes 124-139 *infra*.

76. Grosso v. United States, 390 U.S. 62, 67-68 (1968).

77. California v. Byers, 402 U.S. 424, 430 (1971) ("hit and run" statute compared with income tax laws).

78. INT. REV. CODE OF 1954, §§ 7201-16.

79. *See* California v. Byers, 402 U.S. 424, 430 (1971). *But see id.* at 460 (Black, J., dissenting).

80. One writer has criticized this requirement. Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUPREME CT. REV. 103. The author states: "It is hard to imagine how . . . any argument can be made to turn on the importance of the governmental objective sought to be achieved . . . that could constitutionally justify set-

The Internal Revenue Code imposes a duty on all taxpayers to keep records which will support the returns they file,[81] and the Internal Revenue Service may require that a person "keep such records [as the Service] deems sufficient."[82] If the information obtained from these records satisfies the requirement that the records be those which are "customarily kept," a taxpayer required to both file a return and keep supporting records would be denied the protection of the privilege against self-incrimination,[83] and so far the courts have not extended the required records doctrine into this area.[84] To do so would require the argument that a taxpayer would maintain these records absent the pressure by the Internal Revenue Service, an argument of doubtful validity.

The Internal Revenue Code provides that "[r]eturns made with respect to taxes . . . shall constitute public records . . . ."[85] Despite this, however, access to the returns is severely limited both by the code itself and the appropriate regulations.[86] The question therefore arises as to whether this statutory pronouncement satisfies the final requiremen of the required records doctrine that the records must have assumed public aspects which render them analogous to public documents.[87]

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ting aside the privilege. Only the war power, which may have had some influence on the *Shapiro* decision, could conceivably support an argument sufficiently impressive to warrant such a frontal assault on the privilege." *Id.* at 132.

81. INT. REV. CODE OF 1954, § 6001. These records are to be kept available for inspection at all times and are to be retained by the taxpayer so long as their contents are material. Treas. Reg. § 1.6001-1(e) (1959).

82. INT. REV. CODE OF 1954, § 6001. Treas. Reg. § 1.6001-1(a) (1959) provides that: "[A]ny person subject to tax . . . shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax . . . ."

83. *See* Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUPREME CT. REV. 103, 116; McKay, *Self-Incrimination and the New Privacy*, 1967 SUPREME CT. REV. 193, 217; Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 712 (1951). An alien registration receipt card is not the type of record "customarily kept" although an alien eighteen years old or older is required to have it in his possession at all times. United States v. Campos-Serrano, 430 F.2d 173, 176 (7th Cir. 1970), *aff'd on other grounds*, 404 U.S. 293 (1971).

84. *See, e.g.*, United States v. Remolif, 227 F. Supp. 420, 423 (D. Nev. 1964) (*Shapiro* was distinguished and held applicable only to the specific factual situation involved); Blumberg v. United States, 222 F.2d 496, 499 (5th Cir., 1955) (dictum).

85. INT. REV. CODE OF 1954, § 6103(a).

86. See text accompanying notes 165-178 *infra.*

87. In Grosso v. United States the information demanded in the wagering excise tax return was said to lack every characteristic of a public document. 390 U.S. at 68.

Perhaps the best approach to the problem is that taken by Justice Frankfurter, acknowledging that "records required to be kept by law are not necessarily public in any except a word-playing sense. To determine whether such records are truly public . . . we have to take into account their custody, their subject matter, and the use sought to be made of them."[88] In view of the limitations upon access to the returns,[89] and the confidential nature[90] of the information they contain, it is difficult even in the face of statutory pronouncement to consider them "public records."

In sum, the applicability of the required records doctrine to income tax returns and records is questionable. It is doubtful that the second and third requirements of the doctrine will be satisfied—that is, the records are those customarily preserved and that they have assumed "public aspects." Moreover, the vitality of the required records doctrine, if based on the notion of implied waiver, is clouded by the *Marchetti* decision. *Marchetti* repudiates the finding of an implied waiver of a constitutional right without a careful examination of the attendant circumstances.

**The Sullivan Rule**

Of the three rules regarding government required information, the one enunciated in *United States v. Sullivan*[91] is most nearly applicable to the *Garner* situation. In *Sullivan*, the Supreme Court faced for the first time[92] the issue of self-incrimination in the filing of an income tax return. Sullivan accumulated 1921 income sufficient to require that he file a return, which disclosed that most of his income resulted from violations of the National Prohibition Act.[93] A convic-

88. Shapiro v. United States, 335 U.S. 1, 56 (1948) (Frankfurter, J., dissenting). A suggested meaning of "public aspects" is records which are usually known to the public in general rather than records which are essentially personal to the individual. United States v. Campos-Serrano, 430 F.2d 173, 176 (7th Cir. 1970), *aff'd on other grounds*, 404 U.S. 293 (1971). *See generally The Supreme Court, 1967 Term*, 82 HARV. L. REV. 95, 201 (1968).

89. *See, e.g.*, INT. REV. CODE OF 1954, § 6103 (limitations on disclosure of information as to persons filing income tax returns).

90. *See, e.g.*, Treas. Reg. § 301.6103(a)-100 (1961) (providing for inspection by Department of Health, Education, and Welfare with information thus obtained to be confidential); Treas. Reg. § 301.6103(a)-101 (1961) (providing for inspection by congressional committees with information thus obtained to be confidential).

91. 274 U.S. 259 (1927).

92. The cases cited by the Court on the self-incrimination issue were unrelated to the income tax laws. They were: Mason v. United States, 244 U.S. 362 (1917) (testimony before grand jury); United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927) (proceedings before immigration authorities).

93. The facts described are those reported in the court of appeals opinion. 15 F.2d 809 (4th Cir. 1926).

tion of willful failure to file an income tax return was reversed by the Fourth Circuit on the sole ground that a requirement to file a return violated the defendant's Fifth Amendment privilege. The statute in question, according to the Fourth Circuit, required disclosures of illegal activity but failed to provide immunity to the extent demanded by the Fifth Amendment.[94]

The Supreme Court, in an opinion by Justice Holmes, declared that such an interpretation stretched the Fifth Amendment protection too far.[95] A person may not refuse to make any return at all simply because some of the questions in the return call for incriminating answers.[96] The Court also stated, by way of dictum, that a person wishing to claim his Fifth Amendment privilege should do so in the return.[97] These two elements of *Sullivan*—the necessity of filing a return and the requirement that the privilege be claimed therein—are supported by separate policies and apply to *Garner* in different ways.

The first element has been broadly interpreted to mean that a citizen may not refuse to respond to legitimate government inquiries simply because some of the questions may be incriminating.[98] Read in the light of *Marchetti*, *Sullivan* holds that in an essentially neutral field of inquiry, such as income taxation of the public at large, a person cannot refuse to answer, at the least, the netural questions asked: "[A] self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous . . . ."[99] This element of the *Sullivan* decision, as important as it is to the existence of the income tax system, is not determinative of the issue raised in *Garner* regarding the use of information supplied to the government. It simply means that Garner would not have had Fifth Amendment grounds for refusing to file any return at all.

The second element of *Sullivan*, in dictum, holds that objection to specific questions based on self-incrimination grounds should be claimed in the return itself. This dictum was noted in Judge Wallace's dissenting opinion in *Garner* as authority for claiming that "[the] Fifth Amendment privilege *must* be asserted when the income tax re-

94. *Id.* at 811-13.

95. 274 U.S. at 263.

96. *Id.* at 263-64.

97. *Id.*

98. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 198 (Brennan, J., dissenting), *rehearing denied*, 368 U.S. 871 (1961); Powell & Jones, *Self-Incrimination and Fair Play—Marchetti, Grosso, and Haynes Examined*, 18 AM. U.L. REV. 114, 119-20 (1968).

99. Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965) (commenting on *Sullivan*); *accord*, Marchetti v. United States, 390 U.S. 39, 50 (1968).

turn is filed, not at the time of subsequent prosecution."[100] The justification for this reading of *Sullivan* was the much repeated statement: "[T]o honor the claim of privilege not asserted at the time a return was due would make the taxpayer rather than the tribunal the final arbiter of the merits of the claim."[101]

This reasoning may be valid in a situation like *Sullivan* where no return was filed, but it fails to be convincing where the government already has the return and is seeking to use the information reported in it for prosecutions unrelated to the income tax laws. The incriminating nature of the disclosures, after all, has already been placed before the court. The *Sullivan* dictum has been noted in numerous subsequent cases[102] but never has been applied as Judge Wallace suggests—to bar a subsequent invocation of the Fifth Amendment privilege.

In summation, the three major lines of cases in regard to government required information all fail to provide a rule to govern the *Garner* decision. The *Marchetti* line of cases restrict their holdings to those areas permeated with criminal statutes and concerned with groups inherently suspect of criminal activity, and the income tax laws do not fall within these boundaries. The required records doctrine not only has questionable application to income tax returns, but the doctrine itself has been significantly undermined. The *Sullivan* rule, finally, fails to reach the issue in doubt—the governmental use of information supplied in the return. The *Garner* court noted:

> What *Sullivan* left open, and what no Supreme Court case has yet decided, is this question: to what extent and under what circumstances may incriminating information supplied by a taxpayer in an income tax return be used against the taxpayer in a criminal prosecution unrelated to the income tax laws?[103]

## Promulgation of a New Rule

Though no prior Supreme Court rulings were determinative of the admissibility of Garner's tax returns, the Ninth Circuit considered one of its prior cases,[104] together with those of the Fifth and Seventh Circuits,[105] in making its decision. Those cases supported the ad-

100. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 10 (emphasis added).

101. Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965) (commenting on *Sullivan*).

102. *See, e.g.*, Reyes v. United States, 258 F.2d 774, 780-83 n.4 (9th Cir. 1958); Benetti v. United States, 97 F.2d 263, 267 (9th Cir. 1938).

103. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972).

104. Stillman v. United States, 177 F.2d 607 (9th Cir. 1949).

105. Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941) (use of income tax returns in prosecution for mail fraud); Grimes v.

missibility of the returns. *Garner*, however, determined that they did so on the theory of an implied waiver of the privilege against self-incrimination, and proceeded to find that the *Marchetti* line of cases[106] had repudiated that theory. This finding is the operative crux of *Garner*, but before reaching that discussion the Court declared that the admissibility of the disclosures was to be determined by an examination of the circumstances under which they were made. Since the Fifth Amendment protects only against compelled self-incrimination, the Ninth Circuit began by examining the nature of the compulsion involved.[107]

To insure the effective enforcement of the internal revenue laws Congress provided a comprehensive system of civil penalties[108] and criminal sanctions[109] under the Internal Revenue Code. In addition to

United States, 379 F.2d 791 (5th Cir.), *cert. denied*, 389 U.S. 846 (1967) (use of income tax returns in a prosecution for traveling and use of the mails in interstate commerce to promote a gambling scheme); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

106. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 3-4 & n.4.

107. *Id.* at 4.

108. The civil penalties are graduated to concur with the seriousness of the offense. The failure to file a return, in the absence of reasonable cause, will result in a penalty of five percent of the tax due for each month delinquent, but the total penalty may not exceed twenty-five percent of the tax due. INT. REV. CODE OF 1954, § 6651(a)(1). If the failure to pay the tax is because of negligence or intentional disregard of the rules and regulations, but not fraud, five percent is added to the delinquency, in addition to the penalties under section 6651(a)(1). *Id.* § 6653(a). If the underpayment is due to fraud, there is an addition to the tax of fifty percent. *Id.* § 6653(b). If the fraud penalty is imposed, the sanctions under section 6651 are not applied. *Id.* § 6653(d). In all cases six percent simple interest is provided for on the amount of the tax from the date due until paid. *Id.* § 6601(a).

109. The principal criminal sanction contained in the Internal Revenue Code makes it a felony to willfully attempt to evade or defeat taxes. INT. REV. CODE OF 1954, § 7201. This section sets forth two separate offenses; first, a willful attempt to evade the tax; and second, the willful attempt to evade the payment of the tax. To be convicted under this statute there must be willfulness, an existing tax deficiency, and affirmative action constituting an evasion or attempted evasion of the tax. Sansone v. United States, 380 U.S. 343, 351 (1965). An attempt is a separate crime for each year such an attempt is made. See cases collected at 10 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION, § 55A.02, n.17.1 (1970 rev.).

Violation of the administrative provisions of the code, such as willful failure to pay tax, keep records, file a required return, or supply information, is punishable as a misdemeanor. INT. REV. CODE OF 1954, § 7203. To be convicted under this statute for willful failure to file a return, the government must prove that the defendant was required by law to make a return for the year in question, that he failed to file the return at the time required by law, and that the failure was willful. Schmidt & Thatcher, *Lesser Included Income Tax Offenses*, 16 TAX L. REV. 463, 474 (1961). The prosecution may be maintained even though there is no tax due. Spies v. United States, 317 U.S. 492, 495-96 (1943); United States v. Matosky, 421 F.2d 410, 413 (7th

the criminal sanctions contained in the code, supplementary and complementary sanctions are found in Title 18 of the United States Code.[110] These sanctions, according to the court, are substantial.

*Garner*, moreover, notes another variety of compulsion partially economic in operation. To qualify for particular deductions and losses, the Internal Revenue Service must be provided with information showing whether the taxpayer qualifies. For instance, a gambler may only deduct gambling losses to the extent of gambling profits. Furthermore, the failure of a gambler to disclose this information, would subject him to prosecution for perjury or tax evasion.[111] In the case of a person with a large amount of gambling income the financial impact could be quite substantial. The Supreme Court has held that the unlawfulness of the activity does not prevent its taxation[112] and an income's illegal nature will therefore pose no bar to its taxation.[113]

Cir.), *cert. denied*, 398 U.S. 904 (1970). For the requirement of willfulness see Annot., 22 A.L.R.3d 1173 (1968).

A taxpayer may be prosecuted for perjury, a felony under the code. INT. REV. CODE OF 1954, § 7206(1). Elements of this offense are a willful making and subscribing of a return, statement or other document containing a written declaration that it is made under penalty of perjury, and the maker can not believe that that document is true and correct as to every material matter. *See, e.g.*, United States v. Rayor, 204 F. Supp. 486, 489 (S.D. Cal. 1962), *cert. denied*, 375 U.S. 993 (1964); United States v. Accardo, 61-1 U.S. Tax. Cas. 79,423, 79,427 (N.D. Ill. 1960), *rev'd and remanded on other grounds*, 298 F.2d 133 (7th Cir. 1962).

Misdemeanor sanctions are also provided for willfully delivering or disclosing returns, documents, or disclosures which are false as to any material matter. INT. REV. CODE OF 1954, § 7207. This section is applicable to income tax returns. Sansone v. United States, 380 U.S. 343, 347-49 (1965). *See generally* Morris, *Current Criminal Sanctions of the Internal Revenue Code*, 27 J. Mo. B. 388 (1971).

110. *See, e.g.*, 18 U.S.C. § 287 (false, fictitious or fraudulent claims); *Id.* § 371 (conspiracy to commit an offense or to defraud the United States); *Id.* § 1001 (false statement); *Id.* § 1621 (perjury). The government may choose to invoke a sanction under either Title 18, United States Code, or the Internal Revenue Code. *See* Rosenburg v. United States, 346 U.S. 273, 294 (1953) (Clark, J., concurring).

111. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 5-6. The Code provides that wagering losses may be deducted only to the extent of the gains. INT. REV. CODE OF 1954, § 165(d). The excess of the losses over the gains may not be deducted in the current year, and the excess may not be carried over to succeeding years. Skeeles v. United States, 95 F. Supp. 242, 245 (Ct. Cl. 1951); Annie L. Strawder, 17 T.C. Mem. 406, 413 (1958), *rev'd and remanded on other grounds*, 277 F.2d 753 (5th Cir. 1950); Roy T. Offutt, 16 T.C. 1214, 1215 (1951). The fact that gambling losses exceed gambling gains does not mean that the transaction need not be reported. McClanahan v. United States, 292 F.2d 630, 631-32 (5th Cir.), *cert. denied*, 368 U.S. 913 (1961); Clyde F. Powell, 18 T.C. Mem. 170, 175 (1959); Louis Halle, 7 T.C. 245 (1946), *aff'd* 175 F.2d 500 (2nd Cir. 1949), *cert. denied*, 338 U.S. 949 (1950).

112. Marchetti v. United States, 390 U.S. 39, 44 (1968); *see* License Tax Cases, 72 U.S. (5 Wall.) 462 (1867).

113. *See, e.g.*, James v. United States, 366 U.S. 213 (1961) (extortion); Rutkin

Gambling income, in fact, has been specifically held subject to the federal income tax.[114]

The *Garner* court considered such statutory directives sufficient to amount to compulsory disclosure. Such measures, said the court, surrounded Garner with a pervasive system of civil sanctions and criminal penalties, like a series of closed escapeways. He would be subject to prosecution had he not filed a return, or filed a return which was incomplete. To further complete this circle, the incriminating nature of the disclosures would not justify him in submitting false returns.[115]

**Garner and Implied Waiver**

There is, of course, the final possibility for escape expressed by Justice Homes in the *Sullivan* decision: Garner could have claimed his Fifth Amendment privilege on the return.[116] The dissenting opinion, in fact, concluded that failure to claim the privilege when the return was filed constituted a waiver.[117] The majority opinion, on the other hand, countered the argument by attacking generally the implied waiver concept as applied to constitutional rights.[118]

The question thus faced by the *Garner* court was this: if Garner revealed the source of his income in compliance with statutory compulsion, assuming that he was not aware of his right to object to submitting such information, did he thereby waive his right to object to the use of the incriminating disclosures? In *Stillman v. United States*,[119] the Ninth Circuit precedent on this issue, the answer was affirmative;[120] *Garner*, however, re-evaluated and ultimately overruled that decision.[121] In *Stillman*, defendants' income tax returns were used against them, in a prosecution for violating the wartime Emergency Price Control Act, to prove the amount of income unlawfully earned. Appealing the convictions, objections to such usage on Fifth Amendment grounds were rejected on the ground that disclosures on the tax returns were "volun-

v. United States, 343 U.S. 130 (1952) (same).

114. *See, e.g.*, James P. McKenna, 1 B.T.A. 326, 330 (1925). INT. REV. CODE OF 1954, § 61(a) provides that "gross income means all income from whatever source derived. . . ."

115. United States v. Knox, 396 U.S. 77, 82 (1969).

116. United States v. Sullivan, 274 U.S. 259, 263-64 (1927) (dictum). See text accompanying notes 91-103 *supra*.

117. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 10 (Wallace, J., dissenting).

118. *Id.* at 3-4, 6-8. See text accompanying notes 158-163 *infra* for a discussion of what may constitute a waiver in the light of *Garner*.

119. 177 F.2d 607 (9th Cir. 1949).

120. *Id.* at 617-18.

121. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 4.

tarily entered upon a public record."[122] The *Stillman* concept of voluntariness, however, can be deduced from the court's statement: "[T]hey chose to report the illicit income rather than risk possible prosecution for making false or incomplete returns . . . ."[123]

*Garner* concluded that *Stillman* had applied the concept of implied waiver to the disclosures, and that in light of recent constitutional developments the concept "has no place where the issue involves the assertion of a constitutional right. . . ."[124] The *Garner* court specifically refered to *Marchetti*, but Judge Wallace's dissent concluded that *Sullivan*, and not *Marchetti*, should have applied. As discussed above, *neither* of these decisions *control*, but what the majority opinion recognized—and the dissent did not—is that *Marchetti* represents the significant growth of the Fifth Amendment's protection since both *Sullivan* and *Stillman*. It is the continuing process of this growth into which *Garner* fits and upon which it depends.

Since well before the adoption of Fifth Amendment the Anglo-American system of justice has recognized the privilege of a criminal defendant to refuse to testify against himself.[125] On the other hand, the system has also favored the establishment of guilt by the use of confessions.[126] Persons accused of crime were and still are encouraged, both by threats and promises, to make pre-trial admissions. The conflict in these interests of the criminal justice system, between protecting the individual and expediting the prosecution, was frequently resolved in favor of admitting the self-incriminating statements of the accused by establishing that they were "voluntarily" given.[127] This manner of both formulating and resolving the conflict is primarily meaningful only as a test of testimonial trustworthiness, and hardly at all as a test of whether a defendant's basic rights have been violated. Nonetheless, with rare exception,[128] the courts of the United States continued to use this formulation of the conflict long after the adoption of the Fifth Amendment.

In 1966, the U.S. Supreme Court squarely confronted these cross-purposes within the criminal justice system and attempted to rectify

122. Stillman v. United States, 177 F.2d 607, 618 (9th Cir. 1949).

123. *Id.*

124. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 4.

125. For an historical interpretation by the Supreme Court of the Fifth Amendment's background and meaning see Bram v. United States, 168 U.S. 532, 541-561 (1897); and, for an up-date of this analysis see Miranda v. Arizona, 384 U.S. 436, 458-67 (1966).

126. *See* Miranda v. Arizona, 384 U.S. 436, 478-81 (1966).

127. *See id.* at 457.

128. *E.g.*, Bram v. United States, 168 U.S. 532 (1897); Wan v. United States, 266 U.S. 1 (1924).

what it considered to be an imbalance in favor of the prosecution. In *Miranda v. Arizona*,[129] the Court decided that the Fifth Amendment's guarantee against compelled self-incrimination attaches to a criminal suspect as soon as he is taken into custody or is otherwise significantly deprived of his freedom of action.[130] In all future criminal trials, the Court said, by both state and federal authorities, the pre-trial statements of a defendant will not be admissible to establish guilt[131] unless the accused is *fully* informed of his rights to remain silent and to have the advice of counsel.[132] Due process requires that testimonial evidence be voluntary, but the Fifth Amendment's privilege against self-incrimination establishes the entirely distinct requirement that a defendant need not make any statement to authorities, either at trial or before. Henceforth, the admissibility of any statements by the accused must pass both tests. The defendant must be fully and adequately informed of his right to remain silent, and all statements made after such a warning must be free of coercion. Indeed, the burden is upon the prosecution to demonstrate that these constitutional safeguards have been satisfied.[133] In particular, the Court said, a finding of waiver of the privilege against self-incrimination cannot be presumed from a silent record. Evidence must be presented, and the record must show compliance with these requirements.[134]

In the 1968 *Marchetti* line of cases,[135] the Supreme Court enunciated a similar judicial scrutiny of Fifth Amendment waivers with regard to federal gambling registration statutes. A person who engaged in gambling activity, but failed to register as required by the statute, could not be prosecuted for that failure. Despite previous Supreme Court decisions[136] that person retained his privilege not to incriminate himself. A judicial finding of waiver of the privilege by inferring an antecedent choice by the accused between retaining his constitutional privilege and engaging in gambling activity without registering was not permissible:

> Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in

129. 384 U.S. 436 (1966).

130. *Id.* at 444.

131. In Harris v. New York, 401 U.S. 222 (1971), the Supreme Court decided that pre-trial admissions of a defendant taken in violation of the *Miranda* guidelines were admissible as *impeaching* evidence if the accused took the stand in his own defense.

132. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

133. *Id.* at 475.

134. *Id.*

135. See discussion of these cases in text accompanying notes 23-61 *supra*.

136. Lewis v. United States, 348 U.S. 419 (1955); United States v. Kahriger, 345 U.S. 22 (1953).

> other circumstances in which implied or uninformed waivers of the privileges have been said to have occurred . . . . To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation."[137]

**Garner and Exclusion**

*Garner* employed this caveat against implied waivers and re-evaluated past judicial treatment of tax return disclosures in two important respects. First, if there is no showing that an individual was informed of his right to claim the privilege as to the disclosures in the return, a waiver of the privilege will not be implied.[138] In *Garner* the record was silent regarding his knowledge of the right, and the finding of a waiver was thus held to be impermissible.[139]

Second, if the disclosures were compelled to satisfy a noncriminal (*i.e.*, regulatory) purpose, that purpose cannot be later disregarded. Should the government subsequently seek to use the disclosure to show criminal conduct, such use will be precluded.[140] This preclusion is effectuated by the imposition of the exclusionary rule, or as termed by some courts, a use restriction.[141] The controlling factor in determining such use, said the court, should be the individual's relinquishment of a known right, not the government's need for information.[142] Implying a waiver of the privilege against self-incrimination, merely by engaging in activity subject to reporting requirements, was held to go too far. Such a formulation, said the Ninth Circuit, "would allow comprehensive schemes of self-reporting in non-criminal areas to become data banks containing numerous 'admissions' of criminal activity, available without limitation to prosecuting authorities."[143]

The *Garner* decision thus gives effect to a primary purpose of the Fifth Amendment privilege—the preservation of individual privacy.[144] As Justice Douglas has said: "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment."[145] *Garner* therefore established a new rule regarding the relationship be-

137. Marchetti v. United States, 390 U.S. 39, 51-52 (1968).
138. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 7-8.
139. *Id.* at 8.
140. *Id.* at 6-7.
141. See text accompanying notes 148-163 *infra.*
142. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 6-7.
143. *Id.* at 7.
144. *See* McKay, *Self-Incrimination and the New Privacy,* 1967 SUPREME CT. REV. 193, 210-14.
145. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (dictum).

tween government required tax information and the privilege against self-incrimination: for such information to be admissible in a subsequent criminal prosecution, not related to the internal revenue laws, a true waiver of the privilege against self-incrimination must be shown. No longer will the courts imply waiver from the mere filing of information.

## Implications of the Garner Rule

In the *Garner* situation, three possibilities exist for balancing the informational needs of the government and the individual's privilege against self-incrimination. The first is to hold the government's interest paramount, abrogating the privilege in all areas where the government has a legitimate regulatory interest. To so hold would destroy the privilege in many areas where it is now effective through the use of legislation designed to circumvent the constitutional protections. The second is to abolish the requirement that taxpayers self-report their illegal income. This possibility, however, overlooks the government's legitimate regulatory interest and would doubtless result in substantial tax advantages to those who make their living pursuing illegal activities. The Supreme Court has previously rejected such a solution.[146] The third solution is a judicially imposed use restriction in certain cases, the solution espoused in *Garner*.[147] Employing this solution, courts would prohibit prosecutorial use of income tax returns in nontax criminal proceedings absent a showing that defendant knowingly and intelligently waived his privilege against self-incrimination—in practical effect, an exclusionary rule.

The remainder of this note examines in two phases the implications of this use restriction-exclusionary rule established by *Garner*. The first is to explore some of the facets of the rule; its nature, how it is invoked in cases involving income tax returns, and how the prosecution may avoid its impact. The second phase is to assess the propriety of establishing the use restriction, weighing its imposition by standards set out by the Supreme Court.

### Facets of the Use Restriction-Exclusionary Rule

The exclusionary rule renders probative evidence inadmissible when it is obtained as a consequence of law enforcement conduct violative of the Constitution.[148] The Supreme Court has imposed the exclu-

146. James v. United States, 366 U.S. 213, 218 (1961).

147. The majority opinion in *Garner* nowhere specifically uses the term "use restriction" except in discussing California v. Byers. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 4-5. The dissenting opinion does use the expression in characterizing the majority's result. *Id.* at 11.

148. Mapp v. Ohio, 367 U.S. 643, 655 (1961); Jones, *Fruit of the Poisonous*

sionary rule for five types of violations: searches and seizures that violate the Fourth Amendment, confessions obtained in violation of the Fifth and Sixth Amendments, identification testimony obtained in violation of these amendments, evidence obtained by methods so shocking that its use would violate the due process clause, and denial of the right to counsel in violation of the Sixth Amendment.[149] The justification given for the exclusionary rule is that it will act as a "deterrent safeguard,"[150] in that it will deter law enforcement officers from illegal behavior and improper practices.[151] The exclusionary rule has, in fact, been called the most effective means to "compel respect for the constitutional guaranty . . . ."[152] *Garner* extends the exclusionary rule to evidence in an individual's income tax return obtained in violation of the privilege against self-incrimination.

When applied to income tax returns and the information contained therein, the exclusionary rule's invocation in a subsequent non-tax-related prosecution may be based on either of two findings. The first is a determination that the individual submitted the return without waiving the privilege against self-incrimination or that the waiver failed to meet the requirement of being knowingly and intelligently made. The second is that the evidence submitted was acquired from the return or derived from it as "fruit of a poisonous tree."[153] This exclusionary rule-use restriction was applied by *Garner*, and the result does not

*Tree*, 9 ST. TEX. L.J. 17 (1966). The exclusionary rule had its origin in Weeks v. United States, 232 U.S. 383 (1914) and Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). *Mapp v. Ohio* held that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendment and was enforceable against the states through the due process clause of the Fourteenth Amendment. 367 U.S. at 655-60; Linkletter v. Walker, 381 U.S. 618, 636 (1965).

149. *See* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

150. Mapp v. Ohio, 367 U.S. 643, 648 (1961).

151. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1003 (1965); Oaks, *Studying the Exclusionary Rule in Searches and Seizures*, 37 U. CHI. L. REV. 665, 671 (1970).

152. Mapp v. Ohio, 367 U.S. 643, 656 (1967), *quoting from* Elkins v. United States, 364 U.S. 206, 217 (1960). *Mapp* relied on People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) to show that experience had shown that the other remedies available were "worthless and futile." 367 U.S. at 651-52. *Contra*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 422-23 (1971) (Berger, C.J., dissenting) (statutory scheme proposed providing a remedy in lieu of the exclusionary rule); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756-57 (1970).

153. *See* Jones, *Fruit of the Poisonous Tree*, 9 ST. TEX. L.J. 17 (1966).

seem to place unconscionable burdens on the federal prosecuting authorities.

Although difficult, it is doubtless possible for the prosectuion to establish that the evidence was not garnered from the tax returns, assuming, of course, that it was not. This presupposes that the defendant has raised the issue of the admissibility of the evidence, whereupon the prosecution must affirmatively show that it is admissible.[154] In general terms, the prosecution must demonstrate an independent source[155] or origin.[156] It could, for example, show that evidence of gambling activities was discovered as the result of information totally unrelated to inspection of the income tax return, and if the prosecution succeeds, the taint will be dissipated.[157] In this manner, evidence contained in an individual's income tax return obtained in violation of the privilege against self-incrimination will be accorded the same treatment as that given evidence obtained in derogation of the Fourth Amendment protection against unreasonable searches and seizures.

The other way in which the government may free its case from the taint of inadmissible evidence obtained from tax returns is to demonstrate that the defendant waived his Fifth Amendment right in supplying the information. *Garner* simply said that presuming waiver from a silent record would be impermissible,[158] and governmental procedures for showing such a waiver were not discussed. General rules for establishing waiver of constitutional rights, however, have been established in previous cases. *Johnson v. Zerbst*[159] stated the rule:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.[160]

Establishing a waiver in a particular case is therefore a matter of examination of the particular circumstances involved, and here, too,

154. United States v. Goldstein, 120 F.2d 485, 488 (2d Cir. 1941), *aff'd* 316 U.S. 114 (1942); Nardone v. United States, 308 U.S. 338, 341 (1939) (dictum).

155. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

156. Nardone v. United States, 308 U.S. 338, 341 (1939) (dictum); *see* Wong Sun v. United States, 371 U.S. 471, 484-85 (1963); United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950).

157. *See, e.g.*, Zap v. United States, 328 U.S. 62 (1946) (knowledge of document obtained prior to and independently of action in seizing document in violation of the Fourth Amendment); Maguire, *How to Unpoison the Fruit*, 55 CRIM. L.C. & P.S. 307 (1964).

158. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 8. See text accompanying notes 124-137 *supra*.

159. 304 U.S. 458 (1938).

160. *Id.* at 464.

the government has the burden of proof.[161] It is clear that a statement printed on the income tax return, to the effect that the informant waives all Fifth Amendment privileges to the statements supplied, would not insure the finding of waiver.[162] There can be no per se rule regarding a waiver, and the determination must be left to future cases on an ad hoc basis,[163] with a heavy emphasis on a presumption in favor of individual rights.

**Propriety of Imposing the Use Restriction-Exclusionary Rule**

In *Marchetti v. United States*,[164] the Court rejected the government's proposal that it prescribe a use restriction on the disclosures in the wagering excise tax returns.[165] The Court held the circumstances were inappropriate because not only would a use restriction be contrary to congressional intent, it would seriously hamper enforcement of state gambling statutes. Notwithstanding the factual differences between the two cases, it would seem reasonable to test *Garner*'s imposition of the use restriction against the criteria provided in *Marchetti*.

*Marchetti* found that Congress had intended information gathered by the wagering excise tax scheme to be made available to interested prosecuting authorities.[166] Section 6107 of the Internal Revenue Code,[167] now repealed, provided that lists of those paying such excise taxes be maintained in the principal internal revenue office in each revenue district. The lists were deemed public records, to be furnished to any prosecuting authority upon payment of a nominal fee, and this procedure had been the consistent practice of the Internal Revenue Service.[168]

161. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

162. See United States v. Hayes, 385 F.2d 375, 377-78 (4th Cir. 1967), *cert. denied*, 390 U.S. 1006 (1968) (dictum), where the court said: "the mere signing of a boiler-plate statement to the effect that a defendant is knowingly waiving his rights will not discharge the government's burden. . . ."

163. Narro v. United States, 370 F.2d 329, 330 (5th Cir. 1966), *cert. denied*, 387 U.S. 946 (1967).

164. 390 U.S. 39 (1968).

165. The Court stated that a use restriction would be an "attractive and apparently practical resolution" of the problem presented but deemed the circumstances inappropriate for such an imposition. 390 U.S. at 58. Any restrictions to be imposed so as to make the statutory scheme enforceable were entrusted to Congress. *Id.* at 58-60.

166. *Id.* at 58-60.

167. Although INT. REV. CODE OF 1954, § 6107 had been enacted prior to the excise tax on wagering, *Marchetti* found that Congress "understood and wished" prosecuting authorities to be provided with lists. 390 U.S. at 59, n.16. Section 6107 was repealed by Act of October 22, 1968, Pub. L. No. 90-618, § 203(a), 82 Stat. 1235.

168. Caplin, *The Gambling Business and Federal Taxes*, 8 CRIM. & DELIN. 371, 378 (1962).

Although not raised by the court, the question arises in *Garner* whether such use restrictions would be contrary to congressional intent. In section 6103(a)(1) of the code, Congress propounded what can only be deemed an ambivalent position, providing that:

> [r]eturns made with respect to taxes . . . shall constitute public records; but, except as hereinafter provided in this section, they shall be open only upon order of the President and under rules and regulations prescribed by the Secretary . . . and approved by the President.[169]

Congressional intent is not shown by this statute. The executive branch, through the Treasury Department, is granted the authority to determine the extent to which tax returns may be used by the government. Pursuant to this authority, the regulations provide that such returns are open to inspection by a United States attorney in the course of his official duties.[170] These returns may in turn be employed in any court, provided that the United States has an interest in the result.[171] The only condition attached is that uses of the return are limited to purposes for which it was furnished.[172]

It can be argued, however, that the regulations infer an indication of congressional intent. Congress, if it did not approve of the regulations promulgated by the Treasury Department, could express its contrary intent through specific legislation.[173] The regulations, however, are capable of two interpretations. Under the first, they may be seen as contemplating all litigation, tax-related or not. Alternately, the thrust of the regulations may be characterized as ambiguous, and use of the returns under such an interpretation should be restricted to tax-related proceedings. Although a number of cases have upheld the introduction of tax returns where the prosecution was for a nontax-related offense,[174] they did not address themselves to the individual's Fifth Amendment privilege. Moreover, the age of these decisions—three or four decades old by now—indicates that they became law prior to recent decisions extending the Fifth Amendment's protections.

Supporting the contention that use of returns should be restricted to tax-related proceedings is section 6103(b)(2), dealing with the use of federal income tax returns by the states. It provides:

169. INT. REV. CODE OF 1954, § 6103(a)(1).

170. Treas. Reg. § 301.6103(a)-1(g) (1961).

171. *Id.* § 301.6103(a)-1(h) (1961).

172. *Id.*

173. *See* Fribourg Nav. Co. v. Commissioner, 383 U.S. 272, 283 (1966). *But see* Automobile Club v. Commissioner, 353 U.S. 180, 185 (1957).

174. *E.g.*, United States v. Rollnick, 91 F.2d 911, 918 (9th Cir. 1937) (mail fraud); Lewis v. United States, 38 F.2d 406, 413 (9th Cir. 1930) (same); Gibson v. United States, 31 F.2d 19, 22 (9th Cir.), *cert. denied*, 279 U.S. 866 (1929) (National Prohibition Act violation); Lewy v. United States, 29 F.2d 462, 464 (7th Cir. 1928), *cert. denied*, 279 U.S. 850 (1929) (mail fraud).

> All income returns filed with respect to the taxes imposed . . . shall be open to inspection by an official, body, or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purpose of such administration . . . . *Any information thus secured . . . may be used only for the administration of the tax laws of such State.* . . .[175]

Thus, an affirmative legislative mandate limits the states in their use of federal tax returns, restricting such use to tax-related offenses. The regulatory rather than the prosecutorial role of the state is emphasized, and it follows that identical reasoning should apply to the federal government. Since the Internal Revenue Code is primarily a regulatory scheme,[176] the regulations should be construed to effectuate this basic purpose and their provisions should be deemed applicable to tax-related offenses only. Viewed in this manner, the imposition of a use restriction will not thwart congressional intent, thus satisfying the first element of the *Marchetti* test concerning such restrictions—a consistency with congressional intent.

The *Marchetti* Court feared that the imposition of a use restriction would seriously limit enforcement of state gambling statutes.[177] The states, in subsequent prosecutions laboring under such restrictions, would have to prove that "their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes . . . ."[178] The imposition of a use restriction for income tax returns, however, *will* satisfy the second requirement of the *Marchetti* test; it will not seriously hamper enforcement of state revenue statutes. Unlike section 6107 of the Internal Revenue Code, at issue in *Marchetti*, section 6103(b)(2) *bars* the states from inspecting federal income tax returns for all purposes other than to enforce their own tax statutes.[179]

The dissent in *Garner* argued that the Supreme Court decision in

175. INT. REV. CODE OF 1954, § 6103(b)(2) (emphasis added). The legislative purpose behind the enactment appears from a review of the prior statutes on the point. The Revenue Act of 1934 had made the information contained in the income tax returns "public records" and completely open to public inspection. Revenue Act of 1934, ch. 277, § 55(b), 48 Stat. 698. This section was quickly amended to provide for inspection by a state "only for purposes of, and may be used only for, the administration of [its] tax laws." Act of April 19, 1935, ch. 74, § 55(b), 49 Stat. 158. The debate surrounding the amendment indicates that the primary aim was to enable the states to enforce their tax laws, without completely abrogating the individual's right to privacy. 79 CONG. REC. 3389-3413 (1935).

176. See text accompanying notes 77-80 *supra.*

177. For applicable state gambling statutes see Marchetti v. United States, 390 U.S. 39, 44 n.5 (1968).

178. *Id.* at 59; *accord,* Grosso v. United States, 390 U.S. 62, 69 (1968); *cf.* Haynes v. United States, 390 U.S. 85, 99-100 (1968). See text accompanying notes 153-157 *supra.*

179. See text accompanying notes 166-75 *supra.*

*California v. Byers*,[180] holding that the California "hit and run" statute did not violate the privilege against self-incrimination, foreclosed any Ninth Circuit adoption of use restrictions.[181] The decision in *Byers*, however, rested upon the premise that the information could be required because the possibility of incrimination did not meet the "appreciable danger" requirement.[182] In *Garner*, on the other hand, the court is not concerned with whether an individual resists the self-disclosure scheme but what use is made of the information once disclosed. The dissent failed to grasp the basic issue in the case, and argued that because the initial disclosures could not be resisted on Fifth Amendment grounds, their subsequent use would be constitutionally inoffensive because the information is "volunteered."[183]

## Conclusion

In order to comply with *Garner*, there exists the possibility of amending the Internal Revenue Code to bring it into direct agreement with the court's decision. There is ample precedent for this type of action. After the Supreme Court held in *Haynes v. United States*[184] that the registration provision of the National Firearms Act violated the Fifth Amendment privilege, Congress enacted the Gun Control Act of 1968.[185] This amended the National Firearms Act to cure the defect. Rigid restrictions were placed on the use of information collected,[186] and furthermore, as a matter of administration, the data filed was not to be available to local, state or federal agencies.[187] Precisely the same enactment is needed in the field of information contained in an individual's income tax returns, at least when it is being used against him

180. 402 U.S. 424 (1971).

181. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 10-11 (Wallace, J., dissenting).

182. See text accompanying notes 51-55 *supra*. The question in *Byers* was whether the statute, without a use restriction, violated the privilege against self-incrimination. 402 U.S. at 427. An alternative ground for the decision was that the disclosures required were not testimonial or communicative within the meaning of the Constitutional privilege. *Id.* at 432.

183. Garner v. United States, No. 71-1219 (9th Cir., June 5, 1972) at 6-7.

184. 390 U.S. 85 (1968).

185. Gun Control Act of 1968, Pub. L. No. 90-618, Title II, Sec. 201, 82 Stat. 1227, INT. REV. CODE OF 1954, § 5810-48.

186. "No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall . . . be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence." INT. REV. CODE OF 1954, § 5848.

187. United States v. Freed, 401 U.S. 601, 606 (1971).

in later, nontax-related, criminal proceeding. Such an enactment would have the effect of codifying the result obtained in *Garner*.

In either case, income tax return information will be prohibited in a nontax-related, criminal prosecution unless the government can show a waiver of the privilege against self-incrimination at the time the return was filed. Also, assuming the individual's income tax return *was* acquired, some of the evidence introduced in the subsequent proceeding may be subject to the exclusionary rule as "fruit of the poisonous tree." This is the lesson of *Garner*. The two limitations may raise considerable barriers to this type of prosecution in the future. The best approach would be for Congress to recognize that the regulatory rather than the prosecutorial function of the government is paramount in the area of income taxation and enact an amendment to the Internal Revenue Code restricting the use of the information collected in tax returns thereby prohibiting its dissemination to other agencies for use in nontax-related proceedings.

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